HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE

AND

HON'BLE SHRI JUSTICE G.BHAVANI PRASAD

WRIT PETITION No. 2907 of 2006

Between:

M/s Venkata Sai Rice and Dhall Mill,

Yerragonda Palem, Prakasam Dist.

represented by its Proprietor

Mr.Mandukuri Krishna Reddy ..Petitioner

AND

The Commercial Tax Officer,

Markapur Circle, Markapur,

Prakasam Dist. ..Respondent

Counsel for the Petitioners: Mr Sk. Jeelani Basha

Counsel for the Respondent : The Govt. Pleader for

Commercial Taxes

Dated: February 21, 2006

ORDER:

Per G.S.Singhvi, C.J.

This is a petition for quashing order dated October 3, 2005 passed by Commercial Tax Officer, Markapur Circle, Markapur (respondent) vide which he created tax liability of Rs.1,62,435/- against the petitioner under the Andhra Pradesh Value Added Tax Act, 2005 (for short 'the Act').

We have heard Sri Sk. Jeelani Basha, learned counsel for the petitioner and learned Government Pleader for Commercial Taxes. In our opinion, the writ petition is liable to be dismissed because the petitioner has failed to avail the

statutory alternative remedy of appeal in terms of Section 31 of the Act.

Learned counsel for the petitioner tried to persuade us to entertain the petition by stating that notice dated September 23, 2005 issued by the respondent proposing to create the tax liability amounting to Rs.1,62,435/- had not been served upon his client and, therefore, the final order should be declared as nullity on the ground of violation of the rules of natural justice and the availability of alternative remedy of appeal should not be treated as a ground for non-suing his client, but we have not felt persuaded to agree with him. The question whether or not the petitioner had received notice dated September 23, 2005 is essentially a question of fact which can be properly decided by the appellate authority on the basis of evidence to be produced by the parties and there is no extraordinary reason for us to undertake that exercise.

We are of the further view that even if Article 226 of the Constitution does not, in terms, bar the filing of a writ petition only on the ground of availability of alternative remedy, the writ petition does not1 deserve to be entertained because it is one of the well recognized rules of self-imposed restraint that the High Court will not entertain writ petition under Article 226 of the Constitution, if an effective alternative remedy is available to the petitioner. In the facts and circumstances of the present case, we do not find any valid ground to depart from the above stated rules.

In **A.V. Venkateshwaran v. R.S. Wadhwani** the Constitutional Bench of the Supreme Court while reiterating the rule that the party who applies for the issue of a high prerogative writ should, before he approaches the Court, exhaust the other remedies open to him under the law is not one which bars the jurisdiction of the High Court to entertain the petition but is a rule evolved by the Courts for the exercise of their discretion, observed as under:

> "The wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under Art.226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est and that in all other cases, Courts should not entertain petitions under Art. 226, or in any event not grant any relief to such petitioners cannot be accepted. The two exceptions to the normal rule as to the

effect of the existence of an adequate alternative remedy are by no means exhaustive, and even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative remedy. The broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court."

I n **Thansingh Nathmal v. Superintendent of Taxes** another Constitutional Bench of the Supreme Court considered the question relating to exercise of discretion by the High Court in entertaining a writ petition despite the availability of alternative remedy and held:

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

I n **Baburam v. Zilla Parishad** the Supreme Court reiterated the rule of alternative remedy in the following words:

> "When an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted."

Their Lordships carved out the following two exceptions to the rule of alternative remedy:

1. where proceedings are taken before a Tribunal under a provision of law, which is ultra vires to the Constitution,
2. where the impugned order has been made in violation of the rules of natural justice.

In **Champa Lal v. I.T. Commissioner**, **J.M. & Co. v. Agricultural I.T. Officer, Assam**, **C.I.T. v. Ramendra Nath Ghosh**, **Swadeshi Cotton Mills Co. Ltd., v. Government of U.P.**, **Gujarat University v. N.U. Rajguru**, **State of H.P. v. Raja Mahendra Pal**, **L.L. Sudhakar Reddy v. State of A.P.**, **State of Bihar v. Jain Plastics & Chemicals Ltd.,**, **Harbanslal Sahnia v. Indian Oil Corporation Ltd.,**, **ABL International Ltd., v. Export Credit Guarantee Corporation of India Ltd.,** the Supreme Court applied the rule of alternative remedy in different situations. I n **Harbanslal Sahnia**[12] (supra) the Supreme Court considered the situations in which the High Court can exercise under Article 226 of the Constitution of India notwithstanding the availability of alternative remedy and held:

> "The rule of exclusion of writ jurisdiction by availability of an

alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: *i*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See ***Whirlpool Corpn.* v. *Registrar of Trade Marks {(1998) 8 SCC 1}***. The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

In **Titaghur Paper Mills Co. Ltd. v. State of Orissa** the Supreme Court stated the rule of alternative remedy in the following words:

"Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute alone must be availed of. Under the scheme of the Orissa Sales Tax Act, there is a hierarchy of authorities for granting redress. The petitioners had an equally efficacious alternative remedy by way of an appeal to the Prescribed Authority under sub-section (1) of Section 23, then a second appeal to the Tribunal under sub-section (3)(a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act. The Act provides for an adequate safeguard against an arbitrary or unjust assessment, such as right to prefer appeal under Section 23 (1) and to apply for stay of recovery under clause (a) of the second proviso to Section 13 (5). Thus the Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226.

In the present case the challenge was only to the regularity of the proceedings before the S.T.O. as also his authority to treat the gross turnover returned by the petitioners to be the taxable turnover. The impugned orders of assessment were not challenged on the ground that they were based on a provision which was ultra vires. There was no question as to jurisdiction to make the assessment. The entrustment of power to assess was not in dispute, and the authority within the limits of his power was a Tribunal for exclusive jurisdiction.

There was also no question of denial of natural justice. The petitioners

were served notice of the proceedings under Rule 12 (5) of the Central Sales Tax (Orissa) Rules and Section 12 (4) of the Act. The impugned orders clearly show that the petitioners were afforded sufficient opportunity to place their case. Mere refusal by the S.T.O. to grant any further adjournment and his decision to proceed to best judgment under Rule 15 does not amount to violation of natural justice because the question of grant of any further adjournment was within the discretion of the S.T.O. and is a matter which can be properly raised only in appeal under Section 23 (1) of the Act."

I n **Assistant Collector, Central Excise v. Dunlop India Ltd.** the Supreme Court referred to some earlier judgments, including the one of **Titaghur Paper Mills Co. Ltd. v. State of Orissa**[14] (supra) and held:

"Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

The case of the petitioner does not fall in either of the exceptions enumerated in **Baburam**[3] (supra) or **Harbanslal**[12] (supra).

For the reasons mentioned above, the writ petition is dismissed. However, liberty is given to the petitioner to avail the alternative remedy of appeal. We are also given liberty to the petitioner to file an application for condonation of delay and we hope that the same will be dealt with and decided by the appellate authority without being influenced by the fact that this court has declined to entertain the writ petition.

G.S.SINGHVI, C.J.

February 21, 2006

G.BHAVANI PRASAD, J.

GRR / svs